No. 93-539 (8)

IN THE

Supreme Court of the United States

October Term, 1993

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Question Presented

Whether New York State violated the Establishment Clause when it provided a legislative solution, welcome to both sides of an intractable conflict between residents of a village composed almost exclusively of members of the Satmar sect of Judaism and its school district, over where the village's handicapped children should receive the free public educational services to which the law entitles them, because the State considered the secular concerns of village residents and enacted legislation that created a separate school district whose boundaries are coterminous with the village.

Parties

The parties to the proceeding below are:

1. Louis Grumet, Plaintiff.

2. Albert W. Hawk, Plaintiff.

3. Board of Education of the Kiryas Joel Village School District, Defendant.

4. Board of Education of the Monroe-Woodbury Central School District, Defendant.

5. The Attorney General of the State of New York appeared under New York Executive Law § 71 to defend the constitutionality of the legislation.

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Brief for Petitioner Attorney General of the State of New York

Opinions Below

The opinion of the Court of Appeals, rendered on July 6, 1993, is officially reported at 81 NY2d 518. It is reprinted at pages 3a-55a of the Appendix to the Petition for Certiorari

("____ a"; references to the joint appendix are cited as "JA ____"; references to the Record on Appeal before the New York Court of Appeals are cited as "R ____ ").

The opinion of the Appellate Division was rendered on December 31, 1992, and is reported at 187 AD2d 16, 592 NYS2d 123 (3d Dept 1992). It appears at 56a-84a.

The opinion of the Supreme Court, Albany County, dated January 22, 1992, is reported at 151 Misc 2d 60, 579 NYS2d 1004, and is reprinted at 90a-98a.[1]

Jurisdiction

The order of the Court of Appeals was entered on July 6, 1993. By order filed November 29, 1993 this Court granted petitioner's petition for a writ of certiorari to review the order and opinion of the New York Court of Appeals . The Court's jurisdiction to review the case rests upon 28 USC § 1257(a).

Constitutional and Statutory Provisions Involved

United States Constitution Amendment I; New York State Laws of 1989, chapter 748. These provisions are set forth in the appendix to this brief. (App. pgs. 36-37).

Statement of the Case

Pursuant to chapter 748 of the Laws of 1989, and effective July 1, 1990, the New York State Legislature established a union free school district to be known as the Kiryas

[1]The Supreme Court's Order and Judgment appears at 85a-89a.

Joel Village School District. The new school district's boundaries are coterminous with the boundaries of the duly incorporated Village of Kiryas Joel (hereafter referred to as "the village"), in the Town of Monroe, Orange County, New York (App.).

The Village of Kiryas Joel is ~~a community of~~ Satmar Hasidic Jews. The community practices a lifestyle distinct from the outside communities. This lifestyle was described by the court below in *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174 (1988). (That case involved the manner in which special education services to the village's handicapped children were to be provided.) Separation of sexes is observed within the village. Yiddish is the principal language. Neither television, radio nor English language publications are generally used. There is a male and female dress code: the boys wear long side curls, head coverings and special garments. The children, for the most part, are educated in religious schools, the boys in the United Talmudic Academy and the girls in Bais Rochel, an affiliated school. The boys are educated in the Torah and the girls learn the things they need to know as adult women in the community (5a). *See*, *Board of Education v Wieder*, *supra*, 72 NY2d at 179-180, for fuller details.

Before the legislative enactment at issue, the residents of the village fell within the jurisdiction of the Monroe-Woodbury school district. The challenged legislation was enacted following a series of court cases involving disputes between the residents of Kiryas Joel and the Board of Education of the Monroe-Woodbury school district concerning the provision of special services to the handicapped children of the Village of Kiryas Joel. (This history is fully described in the affidavit of Superintendent Terrence Olivo of the Monroe-

Woodbury school district reproduced at 101a, *et seq.*; *see also*, *Board of Education v Wieder*, *supra*, 72 NY2d at 179.) At the time that *Board of Education v Wieder* was before the Court of Appeals, the Monroe-Woodbury school district had offered the village's handicapped students the special services to which they were entitled under federal and state law[2] at the district's public schools. The inhabitants of the village wanted the services to be provided at the village parochial schools or at a neutral site. Both sides sought a declaration in that case that under New York Education Law the services had to be provided at their claimed location. The Court of Appeals held that under the statute services were not *required* to be provided at any one location. While the services could be provided off the public school premises, they were not required to be provided at the village schools or even at a neutral site. The court noted the services could possibly be provided at a neutral site, but left the constitutionality of the specific location an open question. 72 NY2d at 189, and 189 n 3.

After the decision, the Monroe-Woodbury school district continued to offer its services to the village students within its public schools, but they did not attend because they felt that Monroe-Woodbury's refusal to accommodate their distinct language and cultural needs would have a "major adverse effect on their educational progress" (Aff. of Abraham Wieder, reproduced as Appendix "H" to our Petition, 125a *et seq.*; *see also*, Olivo affidavit, Appendix "G" to Petition, 101a, *et seq.*). Chapter 748, Laws of 1989, was enacted in an effort to

[2]Individuals with Disabilities Education Act (IDEA), 20 USC § 1400 *et seq.*, and the implementing regulations, 34 CFR Part 300 *et seq.*, the Rehabilitation Act of 1973 § 504 (29 USC §§ 794-794[c]) and the implementing regulations at 34 CFR 99; Article 89 of New York State Education Law and Regulations, 8 NYCRR Part 200.

resolve the problem (Governor's Approval Memorandum, JA 40-42).

At the time the legislation was signed, approximately 100 handicapped students in the village were not receiving the special education services they needed (Governor's Approval Memorandum, JA 40-42). The legislation created a public school district in which these children could receive a secular education. It was endorsed by the village, the Monroe-Woodbury school district and the Orange County Executive (JA 42). The statute became effective July 1, 1990 (App.). The new school district operates a public school which provides special education services to the district's handicapped children.[3] Under the statute, the district must operate in a secular manner (JA 41).

The respondents brought a declaratory judgment action in the New York State Supreme Court which challenged the legislation as violative of the Establishment Clause of the First Amendment to the United States Constitution and Article XI, section 3 of the New York State Constitution (JA 67-69).[4] The Attorney General appeared in

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[3]Although most of these children reside within the new district, there are some who attend from other school districts at the latters' direction and pursuant to approval of the New York State Department of Education. (R. 741-742; Appendix to Petition of Monroe-Woodbury 121a).

[4]Originally, respondents were joined by the New York State School Board Association as plaintiffs. The Appellate Division later dismissed the Association for lack of standing and the Court of Appeals denied leave to review that issue (58a-59a). In addition, the original defendants were the New York State Department of Education, various

(Footnote continued on next page.)

this action under New York Executive Law § 71 to defend the constitutionality of the legislation (59a, 94a).

The Supreme Court declared the statute to be a violation of the Establishment Clause of the First Amendment to the United States Constitution and "its New York State counterpart, Article XI, section (3)" (98a). The court held that the statute creating a secular school district within the Village of Kiryas Joel violated all three prongs of the test outlined in *Lemon v Kurtzman*, 403 US 602 (1971) (96a).

The Appellate Division, with one Justice dissenting, affirmed the judgment of the Supreme Court, holding that the legislation violated the first two prongs of the *Lemon* test (the statute must have a secular purpose and its primary effect must neither advance nor inhibit religion) (60a, 63a).

It held that the purpose of the statute was "[n]ot merely to provide special educational services to the handicapped children of the village, but to provide those services within the village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmar Hasidism and avoid mixing with children whose language, lifestyle and environment are not the prod-

(Footnote continued.)
officials of the department, and the State Comptroller. The current petitioners moved to intervene and were added as defendants, while the action was discontinued as to the original defendants (58a-59a). Finally, the second amended complaint raised an equal protection issue as well as others (JA 69). Since the New York Supreme Court decided only the facial constitutionality of the legislation under the Establishment Clause, which then became the sole issue on appeal throughout the state court appellate process, we see no reason to describe the other causes of action in the second amended complaint in any more detail here.

uct of that religion" (61a). The court rejected the notion that there was a secular need for the legislation, based on the fact that special education services were available to the village's handicapped children from the Monroe-Woodbury District (61a-62a). It also found the statute to violate the primary effect prong of the *Lemon* test because the statute achieved segregation of the religious community from the outlying community by creating a school district within a religious enclave. The majority wrote that this effected a symbolic union between church and State, noting again that the services obtained by the legislation were already available elsewhere and that the dispute between communities was based on the language, lifestyle and environment of the village children which is rooted in the religious tenets, practices and beliefs of the community (63a-64a). The court did not reach the third prong of the *Lemon* test (it must not require the State to be excessively entangled in matters of religion) (67a). It simultaneously concluded that the statute violated the New York Constitution, without any separate discussion (60a).

The dissenting justice (Levine, J.) concluded, upon application of the *Lemon* test to the statute, that it is facially valid under both United States and New York State constitutions. Justice Levine drew a distinction between a statute's facial invalidity and its invalidity as applied and concluded that even under the majority's assumptions, the statute is valid on its face as a limited, permissible accommodation to the values represented by the Free Exercise Clause of the First Amendment (68a-69a).

Justice Levine found the legitimate secular purpose in the passage of the legislation to be the provision of publicly supported secular special educational services to the handi-

capped children of the village -- services they needed and to which they were entitled at a neutral site in the village. He concluded that the first prong of the *Lemon* test is passed as long as the statute was not motivated wholly by a religious purpose and that the expressed intent of the Legislature should generally be taken at face value (69a-70a).

The dissent also disagreed with the majority's finding that the primary effect of the legislation is to advance religion. Justice Levine concluded that no symbolic link between church and State had been shown (70a, 78a). The school was physically separate from the village schools and other places of religious observance, and it was run in a purely secular manner. Thus, it was equivalent to a public school's operation at a neutral site (74a).

Emphasizing that the challenge mounted here is a facial one only, he found that the court was bound to look at the statute as a response to the stated position of the Satmar sect in the record here as well as in previous litigation with respect to provision of special education services. He noted that the Satmarers' stated motive for refusing to send their handicapped children to the Monroe-Woodbury public schools was not a religious one, but to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the village, where they claimed that the professional staff did not adequately address the children's language and cultural needs. These bona fide secular needs, even if derived from religious beliefs, may not defeat their entitlement to the purely secular services provided by the State (70a-73a).

In the alternative, he said that even if the Satmarers' refusal to avail themselves of the services offered at Mon-

roe-Woodbury public schools was based on religious reasons, the accommodation of the State to those beliefs did not have the primary effect of advancing religion. Rather, the statute lifts a substantial burden on the sect's free exercise of religion. For without it, he found, the Satmarers would either have to forfeit publicly supported education services for their handicapped children or their religious convictions. He noted that the legislation followed the Satmarers' failure to secure the educational services from Monroe-Woodbury at a neutral site. Indeed, because the statute lifts a burden on free exercise, the symbolism of government endorsement is entitled to relatively little weight in determining a statute's primary effect (78a-83a).

Additionally, the dissent found no excessive governmental entanglement with religion since the school is not pervasively sectarian, but is entirely secular under the challenged statute (82a-83a). He also concluded that the legislation is valid under the New York State Constitution (83a).

On July 6, 1993 the Court of Appeals, by a 4 to 2 vote, modified the Appellate Division's order to the extent that it had invalidated the legislation on the ground that it violated the New York State Constitution and declined to reach the state constitutional issue, and as so modified, affirmed it (17a). The court's opinion (by a three-judge plurality) held that the legislation violated the second prong of the *Lemon* test in that its primary effect was not to provide the village's handicapped children with educational services, but to yield to the demands of a religious community whose separatist tenets create tension between needs of students and religious practices. This conclusion was premised upon the fact that educational services were always available to these

students from the Monroe-Woodbury school district. The court found that the provision of a secular public school in the village goes beyond the neutral site contemplated by this Court in *Wolman v Walter*, 433 US 229 (1977), since the school district is conterminous with the Hasidic community of Kiryas Joel and the school board members who would be elected from the community would all be members of the same religious sect. It wrote that, "Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus, a 'core purpose of the Establishment Clause is violated' ", quoting *School Dist. of City of Grand Rapids v Ball*, 473 US 373, 389 (1985) (16a). The court concluded that the legislature "may not treat the Satmar community as separate, distinct and entitled to special accommodation" (16a).[5]

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[5]There were two concurring opinions. Judge Hancock agreed with the majority that the second prong of *Lemon* was violated, but also found that the first prong was similarly violated because the statute was solely intended to accommodate the villagers' needs to meet their religious requirements (28a-36a). Chief Judge Kaye agreed with the majority that the second prong of *Lemon* was violated, but would not have applied the *Lemon* test at all to the circumstances presented here. She held that legislation that singles out a particular religious group for special benefits or burdens should be evaluated under a strict scrutiny test, which would require the law to be closely fitted to a compelling state interest. Here, she found that there was a compelling reason for the state to bestow what she deemed an extraordinary benefit. Nonetheless, she concluded that the legislation was invalid because the creation of a school district with all the powers of a union free district went beyond the creation of a neutral site where the village's handicapped students could receive services (17a-28a).

The dissenting opinion (Bellacosa, J., with Titone, J. concurring) vigorously disagreed with the majority and concluded that there is strong precedent for what the New York State legislature did and that it does not violate *Lemon* because in its context the legislation's primary effect neither advances religion nor suggests an endorsement of it. It criticizes the court's decision to strike the statute on the ground that the State gave into Satmar religious concerns, in light of the Satmar claims that there were legitimate secular reasons that a separate school district was needed, secular reasons "which are entitled to an enlightened and permissible societal accommodation." (50a).

Judge Bellacosa noted that the statute required the new school district to operate in an entirely secular manner, in sharp contrast to the religious lifestyle practiced in the rest of the village and the district's effort to create such a nonsectarian educational environment is indicative of a secular compromise (51a). The dissent asserted that under the court's opinion, a "symbolic union" always and automatically emerges when control over a public school is placed in the hands of secularly-elected individuals who have a common set of religious beliefs—a rule that stigmatizes the aid as aid to a particular denomination merely because of their membership in a common sect. Judge Bellacosa charged that the court's opinion deprives the village citizens of "certain educational prerogatives in contravention of their fundamental right to self-governance" and implicates their free exercise of religion "simply because they have chosen to live and believe in a particular way together in an incorporated village. . . . In effect, their Free Exercise rights are burdened by draping a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community (*see*,

Church of the Lukumi Babalu Aye, Inc. v City of Hialeah, ___ S Ct ___, 61 USLW 4587 [Scalia, J. concurring], *supra*; *see also*, *McDaniel v Paty*, 435 US 618)" (52a). He warned that the majority's refusal to accept the villagers' concerns as anything but religious is alien to cherished American traditions and values and punishes religious uniqueness (52a-53a). He concluded by finding the legislation a reasonable accommodation of the Satmarer's free exercise of religion (54a).

The petitioners applied to the Court of Appeals for continuation of the automatic statutory stay that had been in effect, pursuant to New York Civil Practice Law and Rules § 5519, throughout the state appellate process. That court denied the application in an order dated July 19, 1993 (Smith, J.).

Thereafter, both school boards applied to this Court (Thomas, J.) for a stay of the Court of Appeals' order, with the Attorney General in support. Upon Justice Thomas' referral of the applications to the full Court, the applications were granted (___ S Ct ___, 62 USLW 3060 [July 26, 1993]), and the order of the Court of Appeals was stayed until final disposition or until a petition for a writ of certiorari was denied.

Summary of Argument

The Establishment Clause does not prohibit a State from addressing the secular needs of a religious community and its attempt to do so should not be perceived as a promotion of the religion itself. Accommodation for concerns of religious groups which are permissible under the First Amend-

ment to the United States Constitution has long roots in American history—roots unearthed in the decision of the New York Court of Appeals. The type of accommodation that the State made in creating a new secular school district in response to the need for one is consistent with the Establishment Clause. The court below misapplied the *Lemon* test and viewed the State's action outside its context when it concluded that the State's accommodation to secular concerns of a religious group was tantamount to an endorsement of the Satmar brand of Judaism.

ARGUMENT

The accommodation the State made in creating a new secular school district coterminous with the village of Kiryas Joel is permissible under the Establishment Clause.

A. New York's Creation of the School District of Kiryas Joel Is Consistent With the Meaning of the Establishment Clause.

It is constitutionally permissible for the Legislature to have created the new school district, whose boundaries are coterminous with an existing political subdivision, with the authority to operate secular public schools. Contrary to the opinions of the courts below, the legislation does not violate the constitutional principles of the separation of church and State in the First Amendment to the United States Constitution.

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

These provisions of the First Amendment are applicable to the States through the Fourteenth Amendment. *See, School Dist. of Abington Tp., Pa. v Schempp*, 374 US 203, 205 (1963).

The purpose of the Religion Clauses was explained by this Court in *Walz v Tax Commission of City of New York*, 397 US 664, 669 (1970):

> [T]he basic purpose of these provisions * * * is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

In *Walz*, this Court upheld New York City's grant of property tax exemptions to religious organizations for religious properties as not violative of the First Amendment because the purpose of the exemption was neither to advance nor inhibit religion, but rather to avoid inhibiting the activities of nonprofit entities which the State considered beneficial and stabilizing influences. *Walz, supra*, 397 US at 672-673.

One year later, in *Lemon v Kurtzman*, *supra*, 403 US 602 (1971), a case involving State financial aid to parochial schools, this Court distilled the *Walz* analysis into a three-part test for challenges to the validity of statutes on Establishment Clause grounds: first, the statute must have a secular legislative purpose; second, its primary effect must neither advance nor inhibit religion; and finally, the statute must not foster excessive government entanglement with religion.

In 1985, in *School Dist. of City of Grand Rapids v Ball*, *supra*, 473 US 373, 381 (1985), this Court described the meaning of the Establishment Clause as, "more than a pledge that no single religion will be designated as a state religion * * * [or] a mere injunction that governmental programs discriminating among religions are unconstitutional * * *. [I]nstead, [it] primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' ", quoting *Committee for Public Education & Religious Liberty v Nyquist*, 413 US 756, 771 (1973). This Court has also acknowledged that the constitution does not require complete separation between government and religion, nor is it possible or desirable. In fact, the constitution requires accommodation, not merely tolerance of all religions, and forbids hostility toward any. Callous indifference would violate the idea of free exercise of religion. *Lynch v Donnelly*, 465 US 668, 672-673 (1984). Most recently, in *Lee v Weisman*, ____ US ____, 112 S Ct 2649, 2657, 120 L Ed2d 467 (1992), this Court reaffirmed that the central meaning of the Religion Clauses is that all creeds must be tolerated and none favored.

Here, in a manner consistent with these principles, the New York State legislative and executive branches came to

the aid of a vulnerable segment of its population—the handicapped children of the religious people living in the Village of Kiryas Joel. The State found the parents and the school district in which they were situated in a standoff, after a long history of litigation that culminated in a decision in the New York Court of Appeals that left them without a resolution, about where the free secular educational services mandated by state and federal law should be given to the children; and it found the children without any educational services at all. The State enacted legislation that created a new secular public school district along the village boundaries, with all the powers and duties of a union free school district.

The students could then attend a secular public school in an environment that would provide them with the bi-cultural, bi-lingual education their parents claimed they needed but was lacking in the Monroe-Woodbury schools and would thus spare them the emotional and psychological trauma that their parents claimed resulted from attendance at Monroe-Woodbury's public schools. On the other hand, Monroe-Woodbury would no longer have to provide for these students. No public money would be spent in or for a religious institution or for educating the students in a religious manner. These students were already entitled to the services to be provided by the new school district. Only the situs of the services was changed.

Thus, the legislation does not promote the religious beliefs of the village's inhabitant's nor does it cause the State, which is charged with the responsibility of monitoring the school's secularity, to be excessively entangled in matters of religion. It did nothing more than to create a new secular school district in response to the need for one.

B. The Challenged Legislation Does Not Violate the Second Prong of the *Lemon* Test.

The Court of Appeals struck down the statute based on its conclusion that it violated the second prong of the test set forth in *Lemon v Kurtzman, supra*, 403 US at 612. Under that test, the "principal or primary effect [of the statute] must be one that neither advances nor inhibits religion". The "primary effect" inquiry has been refined by this Court in its later decisions to ask "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement and by the nonadherents as a disapproval, of their individual religious choices". *School District of City of Grand Rapids v Ball, supra*, 473 US 373, 390 (1985). The statute may not favor, prefer or promote religion. *County of Allegheny v American Civil Liberties Union Greater Pittsburgh Chapter*, 492 US 573, 590-593 (1989).

New York's highest court has used the second prong of the *Lemon* test as a basis upon which to rule that any accommodation of a concern of a religious group is an advancement, promotion and favoritism of their religion that is prohibited by the Establishment Clause of the First Amendment. This ruling extends that test so far outside the circle of protection of the Establishment Clause that it leaves behind the freedoms intended to be preserved. The decision evinces a hostility to the group's way of life and a denigration and diminution of their secular concerns.

The political accommodation the statute makes to resolve the intractable dispute does not make even a symbolic link between government and the tenets of the Satmarers' reli-

gion. The State merely drew the lines to create a school district responsive to the unique secular needs of the village's handicapped students and has no involvement with the Satmar religion itself. The lines drawn by the State were around a school district entirely *secular* in character. The district created does not meet religious needs, since those needs in many cases are diametrically opposed to anything secular (*see, e.g.*, 118a). For example, the legislation requires that there be no separation of the sexes in the Kiryas Joel school district as there is in their religious schools. Females must teach males, and vice versa. The school, like any public school, must have no religious symbols in it. It must operate on the same school calendar as every other district in the area. This sometimes means that the school must be open on Jewish holidays and closed on Christian holidays, such as Christmas (R738-739). *Compare, Parents' Assoc. of P.S. 16 v Quinones*, 803 F2d 1235 (2d Cir. 1986), in which a New York City program to provide remedial education services to Hasidic students on public school premises was held unconstitutional because it made too many accommodations to religious tenets (such as provision of female teachers to female students and construction of walls to keep the Hasidic girls apart from the other students), sending a message to adherents that the government endorsed the tenets of their faith. It must also be remembered that the Monroe-Woodbury school district (the "non-adherents" here) approved and supported the passage of the legislation and, indeed, intervened in this action in its defense. The district's appearance in this action belies any assertions that the government appears to favor or endorse the religious tenets of the Satmarers over the principles of the secular Monroe-Woodbury school district. To the contrary, the endorsement given the statute by both sides of the conflict is evidence of the neutral nature of the solution.

The Court of Appeals plurality appears to be troubled by the fact that the village achieved one of its goals by the enactment of the statute: that of isolation or separation from outside communities. Such a consequence is incidental at best, since the school has to operate in a secular manner, contrary to many Satmar rules. It does not transform the primary effect of an otherwise secular statute into one of religious advancement. *See, Corporation of Presiding Bishop v Amos*, 483 US 327, 338 (1987); *Lynch v Donnelly, supra*, 465 US at 683.

This Court has repeatedly recognized that a statute is not facially unconstitutional simply because it has an incidental beneficial impact on religion. *See, Texas Monthly, Inc. v Bullock*, 489 US 1, 10 (1989); *see also, Lynch v Donnelly, supra*, 465 US at 683. The incidental benefit to the Satmar interest in maintaining their own community and guarding against assimilating influences and temptations does not alter the secular purpose and primary effect of the statute. The more realistic view of the legislation is that rather than insisting on a state of affairs hostile to the Satmarer's unconventional lifestyle, it exhibits a tolerance of a minority view, a healthy and constitutional respect for religious diversity in the search for a solution to the problem of providing the handicapped students of the village with their free appropriate public education. *See, County of Allegheny v ACLU, supra*, 492 US at 613.

Indeed, separation of a religious group is not per se a violation of the Establishment Clause since it is permissible to provide services to a sectarian group on a neutral site. The danger is from the character of the institution receiving public aid, not the pupils. *Wolman v Walter, supra*, 433 US 229 (1977). The public school district in the Satmar village

serves as an island of secularity amidst a religious community. It is the equivalent of the neutral site recognized as permissible under the Establishment Clause. *Id.*

Underpinning the Court of Appeals' conclusion that the accommodation made in order to educate the Satmar students is a violation of the Establishment Clause is a complete denial that the Satmar community, because of the religious nature of its lifestyle and the general homogeneity of its population, can have legitimate secular concerns. The court refused to acknowledge the claims made by the Satmar parents that their opposition to attendance at the Monroe-Woodbury public schools was predicated solely on their concern that attendance by their special needs children in those district schools, where they claim their language and customs are not accommodated and even meet with some hostility, caused the children to suffer emotional trauma and had a negative effect on their educational progress. With one sweep of the hand, the three-judge plurality[6] dismissed the legitimacy of the Satmarers' claims as well as the lifestyle of the Satmarers and insisted on conformity. It therefore failed to perceive that there was a bona fide dispute between the two communities and appears to endorse the Monroe-Woodbury district's steadfast refusal to provide services off its public school premises. If the Satmar community refused the services Monroe-Woodbury offered within its public schools, according to the plurality, it could only have been for religious reasons. Therefore, the court reasoned, the basis for their conflict with Monroe-Woodbury is a religious one, consonant with their desire to be an insular community, and the solution achieved by the legisla-

[6]Judge Kaye, in a separate concurring opinion, acknowledged that there were legitimate secular concerns which may be addressed by educating the Kiryas Joel students separately (24a).

tion creating a new school district represents nothing more than a symbolic endorsement of the Satmar position.

The plurality should not have made the assumption that because the Satmarers' different lifestyle has its genesis in religion, the consequences that flow from it can never be considered legitimate secular interests. Secular interests may have religious roots. The roots of many systems of ethics or morals, for example, may be religious. Yet these interests often manifest themselves in a totally secular context, such as the Penal Law. *See also*, cases holding constitutional the display of cultural (characterized for Establishment Clause purposes as secular) aspects of Christmas and Chanukah, *County of Allegheny v ACLU*, *supra*, 492 US at 617-620; *Lynch v Donnelly*, *supra*, 465 US 668 (1984). As the dissenting judges in the Court of Appeals pointed out, the plurality ignores the fact that the villagers dispute that the Monroe-Woodbury school district would provide the former's students with the relevant bi-cultural and bi-lingual services it claims is required under IDEA (*see*, 127a-128a, JA 93-94). In fact, as the dissenting opinion in the Appellate Division explained, in classifying the Satmarers' claim as religious contrary to what the Satmarers themselves said, the majority is venturing into dangerous territory, entangling a state court in fact-finding regarding what true Satmar religious doctrine is (72a-73a). *See*, *Employment Div., Dept. of Human Resources v Smith*, 494 US 872, 887 (1990); *see also*, *Texas Monthly, Inc. v Bullock*, *supra*, 489 US at 902.

Under the court's reasoning, the community is precluded by the Establishment Clause from ever having their secular concerns addressed by government because of the religious nature of its lifestyle and the general homogeneity of its

population. In other words, the opinion flatly disqualifies the members of the community from being the beneficiaries of state action which would otherwise be available to address secular issues, for the sole reason that it is a religious community, and therefore any state action directed at it would be a promotion, endorsement and advancement of the religion it practices. The Court of Appeals was also needlessly troubled that the community is composed exclusively of Satmar Hasidim, resulting in a democratically elected board of education composed entirely of Satmar Hasidim.

This disqualification is offensive to the protection offered by the First Amendment. First, the idea that religious people cannot act in a secular manner or have the same rights as others in secular matters is an idea that has been discredited long ago in *McDaniel v Paty*, *supra*, 435 US 618 (1978), and is evidence of hostility to religion. Second, the composition or lifestyle of the population does not alter the neutrality of the solution or secularity of the concerns that begged the State's assistance and intervention in an impasse that left innocent handicapped children in the middle, without the educational services to which the law entitled them.

The court's idea that the community of Kiryas Joel cannot have legitimate secular concerns or operate a secular school because of the religious beliefs of the members of its governing body blocked its vision when it analyzed the state action, so that the legislation was separated from its context. The court's examination out of context is antithetical to the rule established by this Court in *County of Allegheny v ACLU*, *supra*, 492 US 573 (1988), and resulted in a distorted point of view and erroneous conclusion that altogether missed the values embodied in the Establishment

Clause and in the second prong's taboo against government action inhibiting religion. The court looked only at the State's action in terms of what it achieved for the Satmar community, and not why the legislation became necessary, what it accomplished for the district in whose charge the Kiryas Joel students had previously been entrusted, or the secular nature of the school it created. It lost sight of what this Court has said the aim of the second prong of *Lemon* is: to prevent government decisionmakers from abandoning neutrality and acting with intent to promote a particular point of view in religious matters. *Corporation of Presiding Bishop v Amos*, *supra* 483 US at 335.

What the Court of Appeals should have done was to examine whether the State, in creating the new school district, was favoring residents of Kiryas Joel over those of Monroe-Woodbury in their dispute over where appropriate educational services were to be given the handicapped students of Kiryas Joel. It should have looked at the legislation with an eye to whether the State was promoting the tenets of the Satmar brand of Judaism or endorsing the religious lifestyle over the less orthodox lifestyle prevalent within the Monroe-Woodbury school district. It should have considered that the opposing parties in the long dispute over the location of the educational services were in agreement that this legislation was a solution acceptable to everyone and made way for peace between the communities. The "adherents" and "nonadherents" alike felt the State had solved their problem. *See*, *Lynch v Donnelly*, *supra*, 465 US 668, 687-8 (1984) (O'Connor, J., concurring). While the legislation creating a separate school district encompassing the village of Kiryas Joel obviously addressed only the village in its language, it is clear from the participation of both

sides of the conflict in this litigation that they both feel equally included in the State's efforts.

In sum, the majority's perspective of the dispute, that it was purely a religious one, leads to a distorted view of the remedial legislation. Once the dispute is seen as a dilemma, or deadlock between two groups with legitimate interests, the statute becomes the negotiated settlement, not an endorsement of either side.

This Court has recognized that the Constitution permits the State to give secular aid to students of sectarian schools in the form of reimbursement to parents of parochial school children for bus transportation expenses (*Everson v Board of Education of Ewing Tp.*, 330 US 1 [1947]), and provision of secular textbooks to parochial students. *Board of Educ. of Central School Dist. No.1 v Allen*, 392 US 236 (1968). It allows a State to provide services to parochial students at neutral sites. *Wolman v Walter*, *supra*, 433 US 229 (1977). Surely, the provision of special education services to *public school* students in a *public school district* is easily within the same constitutional ambit.

C. The Court Below Mistakenly Equated a Permissible Accommodation With an Endorsement of the Religion Itself.

While recognizing that the legislation that it invalidated was " 'an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the Village of Kiryas Joel, whose population are all members of the same religious sect' " (7a, quoting from the Governor's Approval Mem, Bill Jacket, L 1989, ch 748), and even acknowledging that this effort was a "beneficent" one (16a), the court below nonetheless found its primary effect to "*accommo-*

date the desire to insulate the Satmarer Hasidic students [which] inescapably conveys a message of governmental endorsement of religion." (16a)(emphasis added).

The court made a serious mistake in equating an accommodation with an endorsement and in using *Lemon* as the prop for its conclusion. Neither *Lemon* nor analysis under any of this Court's other precedents makes every accommodation to religious groups an endorsement or promotion of their religion. This is especially true here where the accommodation made by New York's legislature and governor was only for the secular, cultural concerns which arose from the Satmarer's insular and religious way of life, and not for any of their religious beliefs.

Indeed, this Court has a long history of recognizing the acceptability in some cases for the government to make allowances for concerns that are religious in nature. They have been made to promote the freedom of religion guaranteed by the First Amendment and do not run afoul of the Establishment Clause. *Zorach v Clauson*, 343 US 306 (1952)—New York law may provide for early release from school for students to attend religious schools; *Wisconsin v Yoder*, 406 US 205 (1972)—exemption for Amish children from compulsory education laws is permissible; *Wolman v Walter*, *supra*, 433 US 229 (1977)—secular therapeutic services may be provided to sectarian students separately, on a neutral site. The New York Court of Appeals suggested in an earlier litigation between the petitioners here (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, *supra*, 72 NY2d 174, 189 n. 3 [1988]) that *Wolman* might supply the answer to this conflict; *Corporation of Presiding Bishop v Amos*, *supra*, 483 US 327—religious organization

may be exempted from Title VII's prohibition against discrimination on the basis of religion.

In *Texas Monthly, Inc. v Bullock, supra*, 489 US 1, 18 n. 8 (1989), Justice Brennan was careful to note, in striking down a statute giving an exemption from tax to publications that advanced the tenets of a religious faith, that his holding "in no way suggest[s] that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause. . ." (emphasis in original). *See also*, the dissenting opinion of Justice Scalia, with whom the Chief Justice and Justice Kennedy joined; 489 US at 38-39. In *Employment Div., Dept. of Human Resources of Oregon v Smith, supra*, 494 US 872, 890 (1990), this Court, while upholding an Oregon decision to deny unemployment benefits to two American Indians who ingested peyote during a religious ceremony and were subsequently dismissed from their employment for work-related misconduct, referred approvingly to state laws exempting the religious use of peyote from the criminal law. This Court reasoned that while such a nondiscriminatory religious-practice exemption may be permitted, or even desirable, it is not constitutionally required. Indeed, as Justice O'Connor noted in her concurring opinion in that case (494 US at 902), "The First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."

Like two stone lions, the Establishment Clause together with the Free Exercise Clause are the guardians of religious liberty. "Through vigorous enforcement of both clauses, we promote and assure the fullest possible scope of religious liberty and tolerance for all and . . . nurture the conditions which secure the best hope of attainment of that end." *Lee v Weisman*, *supra*, 112 S Ct at 2665, 120 LEd2d 467, Blackmun, J. concurring, quoting *School Dist. of Abington Tp., Pa. v Schempp*, *supra*, 374 US 203, 305 (1963), Goldberg, J. concurring. Accommodation has always been considered a zone between the Free Exercise Clause on the one side and the Establishment Clause on the other. Tribe, L., *American Constitutional Law*, § 14-4 at 1166-1169, § 14-7 at 1194 (2d ed. 1988). Even before the First Amendment was drafted, accommodations of religion were common. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 *George Washington Law Review* 685, 714 (1992). Naturally, this Court incorporated the age-old principle of accommodation in its *Lemon* decision when it laid down the second prong of the test: the State may neither "advance nor *inhibit*" religion (*Lemon* at 612)(emphasis added).

The New York Legislature and its Governor acted in this middle zone when they created a public school district along boundaries already drawn (i.e., the Village of Kiryas Joel). It must be remembered that this new district was created for the purpose of solving the problem between the Monroe-Woodbury school district and some of its constituents only after the New York courts left it unresolved after many years of litigation. The solution they arrived at, although not required by the Constitution, was permitted because it showed tolerance and respect for the different lifestyle of the Satmarers, which was protected by a resistance to assim-

ilation. The chosen solution neither endorsed, promoted nor favored the Satmar beliefs themselves. Rather, it was designed to allow them to live, as they have for over sixty-five years (430), in the manner their religion teaches. It so happens that the manner in which they live and worship makes the education of their handicapped students outside the community - an alien world to those students - a difficult and bona fide problem, a problem unfairly impugned by the courts below.[7] See discussion, *infra*, at pp *20-23*.

Respondents would have the Satmarers choose between their lifestyle, which is one that does not assimilate them into the mainstream, largely to preserve their existence (R451, R464), and obtaining the free appropriate public education to which the law entitles them. As the Legislature and the Governor recognized in enacting this statute, this is

[7]Indeed, the New York Court of Appeals had recognized the legitimacy of Satmar needs when it suggested in *Board of Education v Wieder* that the Monroe-Woodbury School District might constitutionally provide the village students special services at a separate neutral site. 72 NY2d 174, 189 and at 189 n 3. *See also*, Judge Kaye's concurring opinion below, at 24a and 27a, in which she acknowledges that the provision of special education services to the Satmar students may be a compelling secular government interest and that it may be accomplished separately from the other Monroe-Woodbury students. Her suggestion, however, that the legislation is unconstitutional because it cannot withstand a strict scrutiny analysis is flawed. Although the factual context may not be the usual aid to parochial schools or prayer in the schools, there is no basis to discard the *Lemon* test in favor of a strict scrutiny test. Such a test would not be a better tool to determine if the State has impermissibly mixed in religious affairs or vice versa. The *Lemon* test has been applied in a variety of factual contexts. There is no need for a stricter standard to determine whether an accommodation is permissible. It is quite different from a determination as to whether an accommodation is *required* under the Free Exercise Clause. That argument is not being made here.

neither an acceptable nor a necessary choice. *Wisconsin v Yoder*, *supra*, 406 US at 218.[8] The Establishment Clause, and all that has been written about it, has never been interpreted to preclude a government act which encourages tolerance of religious differences.

Yet, the Court of Appeals agreed with the respondents in holding that once the Satmar concerns were considered and accommodated by the government in passing the legislation, the Establishment Clause was automatically violated because the government will be perceived as endorsing or favoring the Satmarer's religion itself. This conclusion is offensive to the value of religious freedom and does violence to the admonishment in the Establishment Clause against acts that may be interpreted as hostile to religion. It is in direct contradiction to a principle the courts have for years recognized: that there is room in our constitution for taking religion into account. *Walz v Tax Commission*, *supra*, 397 US at 670.

This Court said in *Lynch v Donnelly*, *supra*, 465 US at 678,

> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith - as an absolutist approach would dictate - the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it

[8]To the extent that the statute here can be viewed, then, as lifting some burden on the sect's free exercise of religion any conceivable appearance of endorsement by the State of the Satmarers' religion by creating a school district within the village is extinguished. *See*, dissenting opinion of Justice Levine in the Appellate Division (81a-82a).

> establishes a religion or religious faith, or tends to so do.

See also, Texas Monthly, Inc. v Bullock, supra, 489 US at 39, in which Justice Scalia said, in his dissenting opinion, "We stated [in *Corporation of Presiding Bishop v Amos*] that the Court 'has never indicated that statutes that give special consideration to religious groups are *per se* invalid.' *Id.* at 338, 107 S Ct at 2869."

Justice Souter (with Justices Stevens and O'Connor joining) reiterated this principle in his concurring opinion in *Lee v Weisman, supra*, 112 S Ct at 2676-2677, 120 L Ed2d at 507, when he said:

> That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); see also *Sherbert v. Verner*, 374 U.S. 398 (1963). Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.
>
> In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steer-

> ing a horse-drawn carriage. In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.
>
> The government may act likewise. * * *

See also, *Wisconsin v Yoder*, *supra*, 406 US at 234-235 n 22.

Thus, accommodations to a religious group are desirable when there are countervailing interests, as here, between a necessary public education and a lifestyle which makes the receipt of those services in the ordinary fashion problematic. Non-conformity, rather than conformity of religion, preserves the very diversity of society that respondents claim to champion in their arguments that schools should consist of a diverse population (Respt Ct App Br, p 48). This Court recently emphasized the importance of the freedom not to conform in one's religion when it held that conducting a formal religious exercise (an invocation and benediction by a member of the clergy) at a school graduation ceremony violated the Establishment Clause of the United States Constitution. *Lee v Weisman*, *supra*, 112 S Ct 2649, 120 L Ed 2d 467. The majority's decision rested upon its aversion to the conformity such an exercise exacted from the students. The concurring opinion of Justice Blackmun (with whom Justices Stevens and O'Connor joined) also expressed disapproval of any requirement of religious conformity. 112 S Ct at 2664-2667, 120 L Ed2d at 491-495. As this Court said of the Amish in *Wisconsin v Yoder*, *supra*, 406 US 205, 226 (1972), "Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage". It was

apparently the New York legislature's and governor's view that under the circumstances here, forcing the Kiryas Joel students to assimilate into the Monroe-Woodbury public schools was not required.[9]

The accommodation made to the secular concerns of the Satmar community relieves them from the pressure to conform their lifestyle to the mainstream in order to avoid the negative consequences they claim flow from sending their handicapped children to public school in an environment alien to their way of life. Indeed, the genius of this legislation is that it ends the conflict between neighbors, provides an opportunity for a secular education to the village's handicapped students, allows for the cultural differences in their way of life from their more secular neighbors, and all the while maintains a neutrality between the two opposing positions.

D. The Legislation Does Not Violate the First and Third Prongs of the *Lemon* Test.

Not only did the Court of Appeals wrongly apply the second prong of *Lemon*, but the statute survives examination under the other two prongs as well. The first prong is that the statute has to have a secular purpose. *Lemon*, 403 US at 612. The purpose for the legislation here is easily ascertained from an examination of the legislative history as well as the history of its beneficiaries -- that is, the Kiryas

[9]Although the Court of Appeals (in *Bd. of Education v Wieder*, 72 NY2d 174 [1988]) said that under New York Education Law the Monroe-Woodbury School District need not confine their services to locations within their public schools, the district refused to provide services elsewhere. Thus, the Kiryas Joel students were left with bleak options before this legislation was passed.

Joel school district and the Monroe-Woodbury school district. The new school district was created to end long years of strife and litigation between the inhabitants of the village and those of the Monroe-Woodbury school district (to which the village initially belonged) over how special education services would be delivered to the village's handicapped students. As the dissenting opinions in the Court of Appeals as well as in the Appellate Division found, the expressed intent of the legislature should be accepted, and since it was not motivated wholly by a religious purpose, this test is satisfied (42a-43a; 70a). *Bowen v Kendrick*, 487 US 589, 602 (1988); *Wallace v Jaffree*, 472 US 38, 56 (1985).

The third prong, whether the legislation fosters an excessive entanglement with religion (*Lemon*, at 613), is not implicated in this case at all. The instances in which this Court has struck down a statute involving aid for education as a violation of the Establishment Clause involved State aid to schools which were pervasively sectarian. *See, e.g., Aguilar v Felton*, 473 US 402 (1985); *Lemon v Kurtzman*, *supra*, 403 US 602, *supra*. The analysis, therefore, necessarily involves an examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority". *Lemon v Kurtzman*, *supra*, 403 US at 615. It is not the nature of the pupils that may present an entanglement problem, but the nature of the institution. *Wolman v Walter*, *supra*, 433 US at 247-248.

Here, the character and purpose of the institution receiving state aid is a secular public school in a newly formed public school district, designed to provide a secular education to the handicapped students of Kiryas Joel. The aid

involved is the same fund that the State was obligated to provide to those students to attend the Monroe-Woodbury public schools before the creation of the new school district. Lastly, the statute does not create any relationship whatever between the government and religious authority, because under its terms the board of education is autonomous and not connected to the religious authority that operates the parochial schools in the village. In sum, notwithstanding the religious practices of the individuals who may sit on the board of education, because the statute creates a school district that is secular without connection to a sectarian institution, there is no entanglement with religion at all. Simply put, matters of religion have no more place in the public school district created by the statute than they do in any other public school district.

We ask this Court to reverse the decision of the New York Court of Appeals and hold that New York State's neutral solution to the previously intractable problem of providing secular educational services to the children of Kiryas Joel is permissible under the Establishment Clause.

CONCLUSION

For the reasons stated, the judgment of the New York Court of Appeals should be reversed and the statute declared constitutional.

Dated: Albany, New York
January , 1994

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APPENDIX—Constitutional Provisions and Statutes Involved.

United States Constitution

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Laws of 1989 chapter 748

AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange County

The People of the State of New York represented in Senate and Assembly, do enact as follows:

§ 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine

members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.